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IN THE SUPREME COURT

OF

THE UNITED STATES

GLENDA MERWINE, PLAINTIFF-APPELLANT

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL, DEFENDANTS-APPELEES

APPENDIX

TO

PETITION FOR WRIT OF CERTIORARI

FROM THE UNITED STATES COURT OF APPPEALS
FOR THE FIFTH CIRCUIT

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MEMORANDUM DECISION
MAGISTRATE CHARLES M. POWERS
for THE U. S. DISTRICT COURT
NORTHERN DISTRICT OF MISS.--------46

Glenda MERWINE, Plaintiff-Appellant,

v.

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, et al., Defendants- Appellees.

No. 84-4036

United States Court of Appeals, Fifth Circuit

March 8, 1985

George McKee, Starkville, Miss., James D. Waide, III, West Point, Miss., for plaintiff-appellant.

William H. Ward, H. Russell Rogers, II, Starkville, Miss., Ed David Noble, Jr., Asst. Atty. Gen., Jackson, Miss., for defendants-appellees.

James S. Whitehead, Mary Hutchings Reed, Chicago, Ill., for amicus curiae.

Appeal from the United States District Court for the Northern District of Mississippi.

Before REAVLEY, TATE, and HILL, Circuit Judges.

ROBERT MADDEN HILL, Circuit Judge:

In her complaint in this case, appellant Glenda Merwine alleges intentional sex discrimination against Mississippi State University (MSU) and members of its hiring committee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec, 2000(e) et seq., and under 42 U.S.C. Sec. 1983, respectively; she also alleges that the imposition of MSU's published entry-level requirement for a faculty librarian position--a Master of Library Science degree from a school accredited by the American Library Association (ALA-MLS)--had an adverse

impact on women in violation of Title VII. Merwine's complaint arises from her unsuccessful application for a faculty librarian position with the Mitchell Memorial Library at MSU in 1980.

The action was tried before magistrate Charles Powers and a jury with stipulation that any appeal would be taken directly to this Court. 28 U.S.C. Sec. 636(c). The Jury found against appellee George Lewis, director of the Mitchell Memorial Library, and awarded Merwine $5,000 actual damages and $5,000 punitive damages for intentional sex discrimination in violation of Sec.

1983./1 Magistrate Powers took under advisement Merwine's claims against MSU under Title VII based upon the alleged disparate treatment of Merwine and the alleged disparate impact upon women of the ALA-MLS degree requirement. He then rendered a final opinion granting Lewis' motion for judgment notwithstanding the verdict and dismissing all other claims including those claims against MSU

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1. Title 42 U.S.C. 1983, in pertinent part, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other properr proceeding for redress.

under Title VII. Merwine duly perfected this appeal.

Merwine challenges the magistrate's grant of judgment notwithstanding the jury's verdict against Lewis. Preliminarily, though, she contends that Lewis' failure to move for a directed verdict at the close of all the evidence precluded the magistrate from addressing Lewis' later motion for judgment notwithstanding the verdict. Finally, she contends that the magistrate's determination that she had failed to establish her Title VII claim of disparate impact was clearly erroneous. For the reasons that follow, we affirm.

I. Facts

In 1978 MSU imposed as a requirement for employment in the

faculty position of librarian the holding of an ALA-MLS degree. In November 1979, MSU advertised in various national library publications a vacancy in the faculty position of branch librarian of the College of Veterinary Medicine. Not having filled the position, MSU readvertised in various national publications in April 1980. In each of the advertisements an ALA-MLS degree constituted the published entry-level educational requirement. The attorney for Merwine conceded at oral argument before this Court that the advertisements for the position Merwine sought did not state that the entry-level requirement was an ALA-MLS or its equivalent. As a result of each of the advertisements, applications were received from across the nation.

Merwine, a thirty-three year old white female, filed her application for the position in May 1980. Thereafter all applications were considered by a search committee composed of one staff and one faculty member from the College of Veterinary Medicine and two female faculty members from Mitchell Memorial Library. Lewis served as chairman of the committee. Between May and August of 1980, the committee reviewed the applications and interviewed two applicants possessing the ALA-MLS degree and one applicant in the process of receiving her ALA-MLS degree. No applicant was interviewed who did not have the ALA-MLS degree. Merwine knew that the ALA-MLS degree was one of the minimum requirements before she applied. Because Merwine

did not possess this degree, her application was not considered further. Subsequently, MSU hired a male applicant who did possess the ALA-MLS degree.

During the period in which applications were considered, Merwine was in the process of receiving a Masters of Education Degree with a major in Secondary Education. She testified, however, that her degree should have been termed a "Master of Education with Major in Secondary Education, Library Science" as planned out with the professor. MSU introduced evidence, however, that it does not offer a Masters in Library Science, accredited or unaccredited, and does not have a graduate degree in library science of any kind. MSU also offered uncontradicted evidence indicating

that eighty to ninety percent of all college and university libraries require the ALA-MLS degree as an entry level requirement for professional-faculty level librarians.

MSU introduced statistics relevant to the disparate impact claim indicating that of the Master of Library Science degrees conferred in this country over the past fifteen years, seventy-nine percent of the ALA-MLS degrees have been conferred upon women, the remaining twenty-one percent upon men. Merwine, however, introduced statistical evidence of the respective percentages of females and males possessing the ALA-MLS degree who applied for professional librarian positions at MSU from 1971 to 1977. Her statistics indicate that 54 percent of the female applicants

possessed the ALA-MLS degree while 89 percent of the male applicants possessed the ALA-MLS degree. Thus, she argues, imposition of the degree requirement in 1978 selects out or preempts a much larger percentage of women than men. These statistics form the basis for Merwine's disparate impact claim.

II. Was Judgment N.O.V. Properly Entertained?

Defendant Lewis failed to move at the close of all evidence for a directed verdict on Merwine's claim of intentional sex discrimination under Sec. 1983. Accordingly, Merwine contends that Fed.R.Civ.P. 50(b) precluded the district court and now precludes this Court from entertaining Lewis' motion for judgment notwithstanding the verdict. Merwine urges strict adherence to form in

complying with Rule 50(b). In Bohrer V. Hanes Corp., 715 F.2d 213 (5th Cir.1983), cert. denied, --- U.S. ---, 104 S.Ct.1284, 79 L.Ed.2d 687 (1984), however, we noted agreement with the Seventh Circuit's pronouncement that although

> [i]t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence,..."[t]he application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth.'"

Id. at 217 (quoting Bonner v. Coughlin, 657 F.2d 931, 939 (7thCir.1981)). In Villanueva v. McInnis, 723 F.2d 414, 417 (5th Cir.1984), we recently restated two purposes of Rule 50(b):

> to enable the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit.

Lewis argures that the facts of this case are similar to those of Bohrer where we excused defendants' technical noncompliance with Rule 50(b) and that the holding in Bohrer whould apply as well here. We agree.

[1] In Bohrer, defendants moved for directed verdict at the close of plaintiff's evidence and the motion was expressly taken under advisement by the court. After the defendants had introduced evidence damaging to plaintiff, the plaintiff offered no rebuttal evidence; further, the

defendants did not renew the motion at this time. Similarly, Lewis moved for a directed verdict against Merwine at the close of her case./2 While this motion was denied, Merwine was alerted to a possible deficiency in her proof by the court's statement that it would "overrule the motion at this time and allow the proof to be further

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2. Merwine contends that the motion for directed verdict at the close of plaintiff's proof was addressed solely to the Title VII claims and not to the Sec. 1983 claim against Lewis. We are convinced, however, that motions for directed verdict were made both to the Title VII claims tried by the court and to the Sec. 1983 claim tried by the jury. While Lewis' motion did not specifically refer to the Sec. 1983 claim, he did cite, in furtherance of his motion for directed verdict, the lack of evidence to prove elements of the Sec. 1983 claim. Moreover, when the motions were renewed, the district court stated, "I am not prepared to grant your motions [for directed verdict] ... [a]s to the claims against Drs. Lewis and Miller." Thus, we find no merit to Merwine's contention on this point.

developed by the defendants." In addition, Lewis' motion was renewed toward the end of the jury trial and taken under advisement at that time by the court. Finally, as in Bohrer, after the motion was taken under advisement, Lewis called two defense witnesses and concluded all the evidence; Merwine than failed to offer any rebuttal evidence. On the record here the accomplishment of the purposes of Rule 50(b) have been fully met. See Villanueva, supra. Because we believe that our decision in Bohrer controls this issue, we excuse any arguable noncompliance by Lewis with the requirements of Rule 50(b) which might constitute a bar to the consideration of his motion for judgment notwithstand the verdict.

Our holding is further bolstered by the fact that Merwine did not object or complain when the trial court continued to act on other motions to dismiss that the court had taken under advisement. The court dismissed two defendants after taking the renewed motions to dismiss under advisement, and retained the motions to dismiss from the two remaining defendants, Lewis and Miller. This conduct by the court, at the time the case was submitted to the jury, indicates that it was aware of potential evidentiary problems with Merwine's Sec. 1983 claim. See Jack Cole Co. v. Hudson, 409 F.2d 188, 191 (5th Cir.1969) (citing Roberts v. Pierce, 398 F.2d 954, 956 (5th Cir.1968)). In addition, Merwine's awareness of the pendency of these

motions indicates an awareness of potential problems of evidentiary sufficiency with the Sec. 1983 claim against Lewis. We are convinced no surprise was effected upon Merwine and that the purposes of Rule 50(b) have been served. To require Lewis in this case, to articulate the words of renewal at the close of all the evidence, under the circunstances here, would be "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." Bohrer v. Hanes Corp. supra at 217 (quoting Quinn v. Southwest Wood Products, Inc., 597 F.2d 1018, 1025 (5th Cir. 1979)).

III. Intentional Sex Discrimination

[2,3] In Merwine's Sec. 1983 claim against Lewis for intentional

sex discrimination, the jury specifically found in response to special interrogatories that Merwine was qualified for the job at issue, but that she had been denied the job because of favored treatment of Bruce Evans, a male applicant. Evans, who possessed the ALA-MLS degree but was in other respects unqualified, was nevertheless hired. The magistrate entered judgment notwithstanding the verdict on this claim after determining that no reasonable jury could conclude that Merwine was qualified for the position. He concluded, therefore, that Merwine had failed to prove a prima facie case of

sex discrimination under Sec. 1983./3

3. When a Sec. 1983 claim is used as a parallel to a Title VII claim under a given set of facts, the elements required to be established for each claim are deemed the same under both statutes. Rivera v. City of Wichita Falls, 665 F.2d 531, 534n. 4 (5th Cir.1982) (citing Whiting v. Jackson State University, 616 F.2d 116 (5th Cir.1980)). Accordingly, this Circuit has held that the standards enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802m 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), for establishing a prima facie case in a Title VII employment discrimination action "presents a logical and appealing application in ... 1983 cases." Ramirez v. Sloss, 615 F.2d 163, 168-69 (5th Cir.1980), quoted in Lee v. Conecuh County Board of Education, 634 F.2d 959, 962 (5th Cir.1981). Under McDonnell the criteria for establishing a prima facie case of employment discrimination are: (1) that plaintiff belongs to a protected class; (2) that plaintiff was qualified for a position for which the defendant was seeking paplicants; (3) that despite being qualified, the plaintiff was rejected; and (4) the position remained open and the employer continued to seek applications from persons of plaintiff's qualification. 411 U.S. at 802, 93 S.Ct. at 1824; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

The magistrate further determined that even if Merwine could be deemed qualified for the position, no reasonable jury could conclude that Lewis' stated reason for not hiring Merwine -- her lack of an ALA-MLS degree--was pretextual.

Merwine contends that the magistrate's entry of judgment notwithstanding the verdict was error because there was substantial evidence to support the jury's finding that Merwine was qualified for the position. She quotes extensively from the record for the proposition that her educational background was the equivalent of an ALA-MLS degree. Merwine further contends that Lewis' preference for and adherence to the degree requirement, knowing she possessed its equivalent, and his

preference for an otherwise unqualified male applicant, Evans, constituted substantial evidence supporting the jury's implicit finding that his insistance upon the degree requirement was pretextual.

A. Standard of Review

Our recent holding in Lyford v. Schilling, 750 F.2d 1341 (5thCir.1985) (per curiam), recites the standard of review applicable to a Title VII case that, as here, has been tried on the merits. Id. at 1344. In Lyford, we stated

> [t]he three-step analysis of prima facie case, rebuttal, and showing of pretext defined by McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is not the proper method of evaluating [a Title VII case that has been fully tried on

the merits]. Williams v. Southwestern Bell Telephone Co., 718 F.2d 715, 717 (5th Cir.1983); see e.g. Wall v. National Railroad Passenger Corp.,718 F.2d 906, 908-09 (9th Cir.1983). As the Supreme Court stated in United States Postal Service Board of Governors v. Aikens, 4670 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983):

> [w]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption "drops from the case," and "the factual inquiry proceeds to a new level of specificity." The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." (citations omitted)

Id.

In another recent decision we stated that "[w]here, as here, the case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the McDonnell Douglas ritual is of no consequence. We are simply to determine whether the record contains evidence upon the basis of which a reasonable trier of fact could have concluded as the jury did." Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 (5th Cir.1983) (footnote omitted). The ultimate issue, that of discrimination vel non, "is to be treated by district and appellate courts in the same manner as any other issue of fact." Williams v. Southwestern Bell Telephone Co. 718 F.2d 715, 718 (5th Cir.1983) (citing Aikens, 103 S.Ct. at 1482).

Accordingly, our review is subject to the same standard as that standard guiding the magistrate's grant of judgment notwithstanding the verdict. In Boeing Co. v. Shipman, 411 F2d. 365 (5th Cir.1969) (en banc), we set forth the standard by which to judge the propriety of a grant of judgment notwithstanding the verdict:

> The Court should consider all of the evidence--not just that evidence which supports the nonmover's case--but in a light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of a motion is proper.

Id. at 374, quoted in Reeves v. General Foods Corp. 682 F.2d 515, 519 (5th cir.1982).

Paying particular attention to the standard of review dictated by

Aikens, we turn to the evidence presented in the course of the trial of this case. In presenting their case below, and in their arguments before this Court, however, the parties have generally followed the McDonnell Douglas three-step format: prima facie case, rebuttal, and showing of pretext. Accordingly, while "it is necessary for us to discuss the elements of that format, our concern is not with the state of the evidence at any of its stages, but rather with the evidence in the case at large." Elliott, supra, at 565 (citing Aikens, supra).

B. Qualification

The magistrate's determination that judgment notwithstanding the verdict was proper centers upon Merwine's failure to establish the

second element (qualification for the position) of her prima facie sex discrimination in hiring case under Title VII. See note 3, supra. The evidence supports the magistrate's conclusion that no reasonable jury could have determined that Merwine was qualified for the position she sought. Merwine asserts that the MSU Promotion and Tenure Policy in effect required not an ALA-MLS degree, but an ALA-MLS degree "or its equivalent". As previously indicated, Merwine's counsel conceded that the ALA-MLS degree only, not the ALA-MLS degree or its equivalent, was the stated minimum educational requirement for the position which Merwine sought. In addition, the notices advertising the position did not include the language "or its equivalent." Further, Merwine

admitted that Lewis, upon her initial inquiry, had informed her of the degree requirement and his strict adherence to the requirement.

[4] Merwine introduced expert witnesses to inform the jury that her qualifications and experience were equivalent to the average qualifications and experience of an ALA-MLS degree holder. This evidence, substantial as it may be, fails to contradict or diminish in any way the simple, uncontested and stipulated fact that Merwine did not possess the published minimum educational requirement-the ALA-MLS degree-for the position of faculty librarian at

MSU./4 The conclusion that Merwine was not qualified for the position is indisputable and a jury verdict to the contrary could not have been reached

4. Our holding does not entirely preclude Merwine from challenging the requirement. She has, more appropriately, asserted a claim of disparate impact under Title VII, alleging a discriminatory practice by virtue of the imposition of the ALA-MLS degree requirement itself. See part IV, infra.

by reasonable persons./5 The magistrate's entry of judgment notwithstanding the verdict on Merwine's Sec. 1983 claim was proper.

C. Was the Qualification a Pretext?

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5. Our conclusion is further bolstered by virtue of a mistaken assumption made on the part of the jury. The magistrate, referring to a note from the jury, stated to counsel:

> Apparently they misunderstood plaintiff's testimony. They say that "the plaintiff testified that the advertisement in which she found out about the job opening contained the phrase ALA-MLS or equivalent. Were there any documents entered supporting this? In other words, were copies of the advertisement entered into evidence?"
>
> I think, as I recall the testimony, they are wrong in evaluating plaintiff's testimony. (emphasis added).

The magistrate correctly recalled that the advertisements listing the job vacancy did not include the phrase "or equivalent".

Even if we accepted Merwine's contention that evidence supported the jury's finding that she was qualified for the position of branch librarian, thus establishing a prima facie case of sex discrimination, we believe the magistrate was correct in his determination that no reasonable jury could find that Lewis' preference for the ALA-MLS degree was pretextual. The legitimate, nondiscriminatory reason offered by Lewis and MSU for selecting Evans rather than Merwine was the fact that Evans held an ALA-MLS degree and Merwine did not. Merwine, however, has failed to produce evidence from which a reasonable jury could find that Lewis' preference for the ALA-MLS degree was a pretext.

[5] Merwine contends that substantial facts justified the jury's

implicit finding of pretext./6 She asserts that Lewis' stated reason for not considering her was undermined by the fact that Evans, while possessing the ALA-MLS, did not possess other stated requirements./7 The mere fact, however, that Evans did not possess other requirements does not lead to the conclusion or even to a reasonable inference that Lewis' adherence to the ALA-MLS degree requirement in Merwine's case was pretextual.

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6. The special interrogatories submitted to the jury did not directly address the question of pretext; however, we will assume that the jury's finding--that Merwine was not hired because of preferential treatment of Evans--encompassed the implicit finding that Merwine was not hired because of her sex and not because she lacked the ALA-MLS degree.

7. Evans did not possess the required background in biomedical and natural sciences.

[6] Merwine also contends that because of Lewis' long tenure with MSU and his familiarity with the degree held by Merwine, Lewis must have known that Merwine possessed expertise equivalent to ALA-MLS degree holders. She concludes that the jury could then infer that Lewis' decision not to hire her stemmed from a discriminatory motive and not from her lack of the ALA-MLS degree. No facts presented by Merwine, however, justify the conclusion that Lewis must have known of the relative equivalence of Merwine's degree to the ALA-MLS degree; accordingly, we believe it would be unreasonable for a jury to draw such a conclusion from the record.

Merwine further contends that the jury could draw inferences of pretext

from the fact that Evans was unqualified but nevertheless hired and from the fact that Lewis declined to change his hiring decision even though the grievance committee chairman had requested him to hold Evans' application in abeyance. While the jury might draw an inference of Lewis' favoritism toward Evans, this evidence does little, if anything, to indicate a pretextual adherence to the ALA-MLS degree in order to discriminate against Merwine because of her sex.

[7] The evidence presented by Merwine, with all reasonable inferences drawn in her favor, does not persuade this Court that Lewis' adherence to the ALA-MLS degree requirement was pretextual. All the evidence, viewed favorably to Merwine, points without hesitation to the

opposite conclusion. The uncontradicted evidence establishes that the ALA-MLS degree is a legitimate nondiscriminatory standard for hiring academic librarians. It is a standard widely recognized and utilized by academic and professional employers, including the United States Supreme Court. In addition, as the parties stipulated, at the time Merwine's application was under consideration, six applications were before the hiring committee. Three of the applicants, two females and one male, possessed the required degree and only these three were interviewed for the position. None of the applicants without the degree was even considered. Lewis' uniform application of the degree requirement is indicative that his denial of

Merwine's application for the same reason was not pretextual in nature. More importantly, Evans applied two months after Merwine's application was denied because she lacked the ALA-MLS degree. As a consequence, it strains logic to infer that Lewis' later preferential treatment of Evans, if any, led to or influenced any pretextual adherence to the ALA-MLS degree in earlier refusing to hire Merwine.

We agree with the magistrate's finding that no reasonable jury could find that the preference for such a degree was a pretext in view of the total lack of any credible evidence indicating the preference for such a degree was not a legitimate, nondiscriminatory factor uniformly applied to all applicants.

Accordingly, we hold that the magistrate did not err in granting judgment for Lewis notwithstanding the jury's verdict.

IV. Disparate Impact

Merwine's alternate claim under Title VII is that MSU's imposition of the ALA-MLS degree requirement constituted impermissible sex discrimination because the requirement effected a disparate impact upon women. In support of her claim, Merwine introduced statistical evidence from a pool of applicants for professional librarian positions at MSU from 1971 to 1977. The magistrate rejected these statistics and found that Merwine had failed to prove a prima facie case of disparate impact. Merwine contends that the magistrate's finding was clearly erroneous. Our

review of the magistrate's memorandum decision leads us to conclude that even if Merwine had statistically made out a prima facie case of disparate impact, the ALA-MLS degree requirement was justified as a business necessity./8

[8] Our analysis of the disparate treatment issue reveals that the stumbling block in Merwine's claim was her inability to prove that Lewis' preference for the ALA-MLS degree was pretextual. Similarly, we believe the magistrate's holding that Merwine failed to establish her disparate impact claim impliedly included the finding that the ALA-MLS degree had a manifest relationship to the

8. Accordingly, we decline to address the issues raised by both parties concerning the relevant statistical labor pool to be addressed.

employment position at issue here./9 We decline to hold that this finding was clearly erroneous. Wild v. Lykes

9. In Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), the Supreme Court stated that

> a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Id. at 446, 102 S.Ct. at 2531 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Our aralysis of the disparate treatment issue indicates that the magistrate resolved the question of pretext based on the degree requirement in favor of Lewis and MSU. Accordingly, we need only address the issue of the relationship between hte degree requirement and the employment position at issue.

Bros. S.S. Corp., 734 F.2d 1124, 1125 (5th Cir.1984)./10

Merwine contends that overwhelming evidence supports the conclusion that the ALA-MLS requirement has no manifest relationship to the position of librarian of the College of Veterinary Medicine at MSU. In support of this contention, she directs our attention to the testimony of her expert witnesses indicating that the ALA-MLS degree is not a legitimate minimum educational qualification for professional librarian positions. The expert witnesses premised their

10. A finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525,542,92 L.Ed. 746 (1949).

conclusions primarily upon a stipulation that "nonALA-MLS degree holders at Mitchell Memorial Library of Mississippi State Unviersity perform equally well as ALA-MLS degree holders at Mitchell Memorial Library." Dr. McComas, president of MSU, however, testified that the position at issue is an entry level position. The stipulation concerning current employees at Mitchell Memorial Library does not necessarily lead to the conclusion that at the entry level, nonALA-MLS degree holders would perform equally well as ALA-MLS degree

holder./11 Further, there is evidence in the record that an accreditation standard is particularly appropriate to ensure not only that the applicant has received appropriate instruction and expertise but also that the institution from which the applicant has graduated fulfills recognized, objective academic standards.

Merwine also contends that since MSU prior to 1978 had not utilized the ALA-MLS as a minimum requirement, "there has simply got to be a feasible alternative to such a hard and fast requirement." We uunderstand Merwine

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11. Merwine also refers us to testimony that faculty librarians at MSU who did not possess the ALA-MLS were promoted while some librarians with the required degree were not. Similarly, this testimony alone does not necessarily indicate that a business necessity does not exist for imposing the degree as a minimum educational requirement for entry-level positions.

to argue from this fact that even though the ALA-MLS degree might bear some relationship to the position of librarian of the College of Veterinary Medicine, because a feasible alternative must exist, the degree requirement can not bear a "manifest" relationship to the employment in question. See Teal, supra, 457 U. S. at 446, 102 S.Ct. at 2530-2531. Merwine fails, however, to point to the feasible alternative she suggests must exist. In addition, the mere fact that MSU had prior to 1978 been operating under a different procedure--ostensibly a less objective one--does not preclude the imposition nor necessity of an educational entry-level requirement to meet the needs of a growing and changing university system.

The evidence Merwine offers to support her contention that the ALA-MLS degree can not be justified as a business necessity does not lead us to conclude "with a definite and firm conviction that a mistake has been committed." United States Gypsum Co., supra. Rather, the evidence we have adduced from the record leads us to believe that the magistrate's finding that Merwine failed to prove her disparate impact claim was correct.

As the magistrate found during the course of his analysis of the disparate treatment issue, "the evidence clearly establishes that the degree is a standard widely recognized by academic and professional employers...." In addition, uncontested evidence indicates that approximately eighty percent of

college and university libraries require that applicants for library faculty positions possess the ALA-MLS degree. Further, there was testimony that on average the ALA accredited MLS degree holder, as opposed to nonaccredited degree holders, exhibits a noted superiority in reliability and dependability to the hiring library. Accordingly, sufficient evidence supports the magistrate's determination that a manifest relationship exists between the degree requirement and the position of librarian of the College of Veterinary Medicine at MSU.

The degree requirement was imposed in 1978 to upgrade the quality of potential applicants and to ensure that future applicants possess the minimum, desired qualifications.

Merwine asserts, however, that a minimum degree requirement will create an artifical barrier to employment for those few who might perform better than an applicant with an ALA-MLS. Thus she contends, the degree requirement may potentially downgrade the MSU library system. Notwithstanding the lack of evidentiary support for Merwine's contention, we believe that the magistrate as trier of fact is the proper party to resolve these issues; and, as we believe that his findings were not clearly erroneous, we conclude that no error was committed.

The ALA-MLS degree requirement is further justified, as a business necessity, in light of evidence indicating that an otherwise subjective standard for entry level

applicants would impose an unreasonable burden on MSU. Merwine's expert witness testified that if he were running a university library with only fulltime university people for volunteer search committee duties, he would have to weigh the choices between subjective requirements and an objective degree requirement. Dr. McComas also testified that the university lacks the resources to properly ensure that minimum standards are maintained in the selection of faculty personnel. He further testified that a review by disinterested professionals of the institutions from which applicants have graduated also ensures the reliability of the quality of the sponsoring institutions' educational programs.

While administrative convenience alone does not validate MSU's imposition of the degree requirement, we believe that MSU's preference for an objective degree requirement that is widely recognized by academic and professional employers and that is required by approximately eighty percent of college and university libraries is supported as a valid business necessity. Our review of the record indicates that the magistrate was not clearly erroneous in concluding that the ALA-MLS degree requirement had a manifest relationship to the position Merwine sought.

For the foregoing reasons, the judgment rendered below is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

GLENDA MERWINE,

Plaintiff

V.
NO. EC 81-154-WK-P

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Defendants

MEMORANDUM DECISION

This action arises from the unsuccessful attempt by plaintiff Glenda Merwine to obtain the position of branch librarian for the College of Veterinary Medicine at Mississippi State University (MSU) in 1980. Although plaintiff raised multiple claims against multiple defendants, the only claims before the court for

disposition at this juncture are plaintiff's claim under 42 U.S.C. Sec. 1983 of intentional discrimination against her on the basis of her sex by defendant George Lewis, director of the Mitchell Memorial Library at MSU, in the hiring decision at issue, plaintiff's counterpart claim against MSU under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e, et seq., and plaintiff's Title VII claim against MSU based upon the alleged disparate impact upon women of the requirement of a specific degree for the job in issue, viz., a Master of Library Science from a school accredited by the American Library Association (ALA-MLS degree).

Plaintiff's 1983 claim against Lewis was tried to a jury, which returned a special verdict for

plaintiff awarding $5,000.00 in actual damages, and $5,000.00 in punitive damages. In the special verdict, the jury specifically found that plaintiff was qualified for the job at issue, but that she had been denied the job because of favored treatment of a male applicant who was unqualified but nevertheless hired. This claim is before the court on motion of defendant Lewis for judgment notwithstanding the verdict. Since the elements of plaintiff's 1983 claim against Lewis are identical to her parallet Title VII claim against MSU, Rivera v. City of Wichita Falls, 665 F.2d 531, 534 n.4 (5th Cir. 1982), disposition of plaintiff's 1983 claim is dispositive of her parallel Title VII claim. E.g., Dairy Queen, Inc. v. Wood, 369 U.S. 469, 8 L.Ed.2d 44

(1962); Caputo v. U. S. Lines Co., 311 F.2d 413 (2nd Cir.) cert. denied, 374 U.S. 833, 10 L.Ed.2d 1055 (1963)./1

Consideration of Lewis' motion for judgment notwithstanding the verdict is controlled by the standard established by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969):

> On motions for ...judgment notwithstanding the verdict the Court should consider all the evidence -- not just that evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court

1. Similarly, the finding of the jury for defendants Lewis and Miller on plaintiff's 1983 claim of sex discrimination in that she was denied the job in question because she was the wife of a veterinary medicine student is dispositive of plaintiff's parallel Title VII claim against MSU.

> believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper.

Id. at 374. After careful consideration under the above-quoted standard of all the evidence introduced in this cause, the court is of the opinion that reasonable men could not, under the applicable law, arrive at a verdict other than for Lewis, and that the motion accordingly is well taken.

To prove a prima facie sex discrimination in hiring case under Title VII, or a parallel claim under Sec. 1983, a plaintiff must show (1) that she is a woman; (2) that she applied and was qualified for the job for which the employer was seeking applications; (3) that she was rejected; and (4) that after her rejection the employer continued to

seek applications from persons of plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L.Ed, 2d 668, 677 (1973). Here, it is undisputed, and is in fact stipulated, that "the American Library Association accredited Master of Library Science degree was the minimum educational requirement for the position of branch librarian of the College of Veterinary Medicine at Mississippi State University, the position sought by the plaintiff." It is further stipulated that the notices advertising such position specified the ALA-MLS as the educational requirement for the job, and plaintiff's own testimony is that Lewis informed her from her initial inquiry about the job that if he made the hiring decision, he was going to

adhere to the ALA-MLS requirement. Plaintiff further testified that one of the members of the Search Committee considering applications for the position informed her that when plaintiff's application was brought up before the Committee, Lewis was adamant about the ALA-MLS requirement. It is further stipulated that of the six applications for the job before the Search Committee at the time the hiring decision was made, three applicants, two female and one male, had ALA-MLS degrees, and three did not, and that only those with the ALA-MLS degrees were interviewed for the job. Also, it is stipulated that plaintiff's application was submitted in May 1980, was brought before the Search Committee at that time, and was not considered after it was determined

that she did not have an ALA-MLS degree. Additionally, it is stipulated that the male applicant who obtained the job held an ALA-MLS degree, and did not apply until July 1980 -- two months after the Committee decided not to consider plaintiff's application because of her lack of an ALA-MLS.

In short, the stipulations and other evidence establish without any contradiction that the ALA-MLS was the minimum educational requirement for the job, and that plaintiff did not hold such degree. The conclusion that plaintiff was not fully qualified for the job thus is inescapable, Hernandez-Cruz v. Fordham University, 521 F. Supp. 1059, 1070-71 (S.D. N.Y. 1981), and the verdict of the jury to the contrary could not have been reached by reasonable men. While

plaintiff could be, and according to the evidence, probably should be, considered subjectively qualified for the job, it is undisputed that she did not meet the established objective minimum educational requirement for the job, and she therefore could not establish a prima facie case of sex discrimination.

Even if plaintiff is assumed to be subjectively qualified for the position, and that she thereby established a prima facie case, the verdict of the jury nevertheless must be set aside. Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to present evidence sufficient to raise a genuine issue of fact that plaintiff was not hired, or that someone else was hired, for a legitimate,

nondiscriminatory reason, which legitimate, nondiscriminatory reason may thereafter be proved by the plaintiff to be a mere pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed.2d 207 (1981). Here, the reason offered for preferring the person hired to plaintiff was the fact that he held an ALA-MLS degree. Without detailing the evidence concerning the desirability vel non of such a degree, the evidence clearly establishes that the degree is a standard widely recognized by academic and professional employers, including the United States Supreme Court. No reasonable jury could conclude otherwise from the evidence received, and no reasonable jury could find that the preference for such a degree was a pretext in view of the

above-enumerated facts established by the stipulations and other evidence, and the total lack of any credible evidence indicating the preference for such a degree was not a legitimate factor uniformly applied to all applicants.

For the foregoing reasons, the court finds that the motion of defendant Lewis for judgment notwithstanding the verdict on plaintiff's Sec.1983 claim of sex discrimination against him is well taken and should be granted, and that judgment should be entered for defendants on plaintiff's parallel Title VII claim for the same reasons.

Plaintiff's alternative claim under Title VII is that she was a victim of sex discrimination in the hiring decision in question because of

the alleged disparate impact upon women of the ALA-MLS requirement./2 Incorporated herein pursuant to Rule 52(a), F.R. Civ.P., are findings of fact and conclusions of law regarding same.

Plaintiff attempted to establish a prima facie case of discriminatory impact of the ALA-MLS requirement by a statistical analysis of applicant flow data for professional librarian positions at MSU using the "four-fifth's" test implicitly approved by the Supreme Court in Connecticut v. Teal, ___ U. S. ___, 73 L.Ed.2d 130 (1982), and showing the results of

2. It is stipulated that the ALA-MLS is no longer a minimum requirement for professional librarian positions at MSU. It was further stipulated at trial that plaintiff has no loss of income because of failure to obtain the job.

such to be statistically significant by a chi-square analysis.

> Although a prima facie case of racial discrimination may be established by nothing more than valid statistical evidence of a significant discriminatory impact of defendant's practices ...the usefulness of such statistics varies with the surrounding facts and circumstances, which either support or undermine the inference of discrimination offered by the statistics.

Williams v. Tallahassee Motors, Inc., 607 F.2d 689, 691 (5th Cir. 1968). In other words, "while statistics are an appropriate method of proving a prima facie case of racial discrimination, such statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion." EEOC v. Datapoint Corp., 570 F.2d 1264, 1269 (5th Cir. 1978). For the reasons which follow, the

court finds that plaintiff's statistical analysis is not probative, and is insufficient to establish a prima facie case of disparate impact of the ALA-MLS requirement on women.

Defendant James D. McComas, President of MSU, testified that MSU recruits nationwide for faculty positions, as did Emmett T. Kohler, Director of Institutional Research at MSU. The position for which plaintiff applied was advertised in several nationwide publications of special interest to professional librarians. Plaintiff's expert witness, Dr. Edward Holly, Dean of the School of Library Science at the University of North Carolina for 11-1/2 years, testified that the geographic market for faculty-level librarian positions is nationwide. His testimony is borne out

by the stipulated residences of the original applicants for the College of Veterinary Medicine branch librarian position, and the same information for the applicants for the vacancy at issue. The stipulations establish that applications were received from residents of Georgia, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, New York, Ohio, Oregon, Texas, Virginia, Canada, and India. The court accordingly finds that the relevant geographic labor market for potential applicants for faculty-level librarian positions such as that at issue is at least the continental United States. See generally, Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1370-71 (5th Cir. 1974).

The evidence further establishes, and the court so finds, that in the past 10 to 12 years, approximately 50,000 ALA-MLS degrees have been awarded nationwide, and that approximately 80% of these degrees have been awarded to women.

> [T]o establish a prima facie case of discrimination a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern.

Dothard v. Rowlinson, 433 U.S. 321, 329, 53 L.Ed 786, 797 (1977). In view of the above figures, it flies in the face of logic and common sense to say that an ALA-MLS requirement "selects applicants for hire" in a manner discriminatory to women.

Because of the great predominance of women ALA-MLS holders in the relevant job market, and the

relatively large number of ALA-MLS degree holders as compared to the sample of applicants relied upon by plaintiff in her statistical analysis -- approximately 200 applicants over a seven-year period -- the court finds the conclusion of disparate impact reached by plaintiff's statistical analysis worthy of little consideration. This is not a case like Connecticut v. Teal, supra, where the impact of a challenged requirement can be determined only by reference to those applying for the position, i.e., where the only manner in which one can achieve the contested requirement is through the application process. The evidence, including the testimony of plaintiff's expert Bemis, also establishes that the applicant data relied upon by plaintiff may not be

representative because of such factors as the salary levels at MSU for the subject years, and the undefined nature of the positions for which the applications were made, other than that they were "professional librarian positions". The Supreme Court has recognized that "[t]he application process might not adequately reflect the actual potential applicant pool ..." Dothard v. Rawlinson, supra, 433 U.S. at 330, 53 L.Ed.2d at 798.

Additionally, the applicant flow data relied upon by plaintiff, when properly limited to plaintiff's individual claim, does not violate the four-fifth's rule. The data relied upon by plaintiff, which is stipulated, is that from 1971-77, there were a total of 111 female applicants for professional librarian

positions at MSU, 60 of whom had an ALA-MLS degree, and 51 of whom did not. The uncontradicted evidence, however, is that of the 51 non-ALA-MLS holders, 35 did not have master's degrees at all. Plaintiff does have a master's degree, and does not complain of a general master's degree requirement for the job. She has no standing to complain about a simple master's requirement, since she cannot suffer any adverse consequences because of a master's requirement, but only from the specific ALA-MLS requirement. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898-99 (5th Cir.) cert. denied, 439 U.S. 835, 58 L.Ed.2d 131 (1978).

When the non-master's female applicants are deleted from the applicant data, there is no violation

of the four-fifth's rule. In the court's opinion, lumping all female applicants together, regardless of their dissimilar qualifications, is fashioning statistics to obtain a desired conclusion, viz., that the ALA-MLS requirement discriminates against women. Such analysis assumes that all women applicants, whatever their credentials, are members of the qualified labor pool from which applicants are sought. Such an assumption is illogical and unwarranted when dealing with professional positions.

The court accordingly concludes that plaintiff has failed to establish a prima facie case of discrimination in hiring on the basis of sex in violation of Title VII because of utilization of the ALA-MLS requirement

by MSU for the position of branch librarian at the College of Veterinary Medicine in 1980.

In summary, the court finds that defendant Lewis' motion for judgment notwithstanding the verdict is well taken, and that defendants are entitled to judgment on plaintiff's Title VII claims. Judgment shall be entered accordingly.

This, 29th day of December, 1983.

Charles M. Powers

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

GLENDA MERWINE,

Plaintiff

V.
NO. EC 81-154-WK-P

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Defendants

ORDER OF JUDGMENT

Pursuant to the Memorandum Decision this date entered herein, it is Ordered and Adjudged that the motion of defendant Lewis for judgment notwithstanding the verdict is hereby granted, that plaintiff have of and take from defendants nothing, and that plaintiff's complaint is hereby dismissed.

SO ORDERED, this 29th day of December, 1983.

Charles M. Powers

UNITED STATES MAGISTRATE

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